(3)

No. 93-1091

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

FEB 10 1994

OFFICE OF THE CLERK

STATE OF SOUTH DAKOTA, BY AND THROUGH THE DEPARTMENT OF SOCIAL SERVICES EX REL. GAIL A. DOTSON, IN HER OWN BEHALF AND ON BEHALF OF JARED DOTSON, A MINOR CHILD,

Petitioner,

v.

MERYL D. SERR,

Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

MARK BARNETT
ATTORNEY GENERAL
State of South Dakota
Counsel of Record

John P. Guhin
Deputy Attorney General
Patricia J. Froning
Assistant Attorney General
500 East Capitol
Pierre, SD 57501-5070
Telephone: (605) 773-3215

Attorneys for Petitioner

21 pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. THE QUESTION PRESENTED WAS CONSIDERED BELOW.	3
II. A TWO YEAR STATUTE OF LIMITATIONS ON PATERNITY ACTIONS MAY NOT CONSTITUTIONALLY BE APPLIED TO SHIELD THE PUTATIVE FATHER FROM SUIT CONSISTENT WITH THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION.	15
CONCLUSION	18

TABLE OF AUTHORITIES

CASES:	PAGE
Cissna v. Tennessee, 246 U.S. 289 (1918)	4
Clark v. Jeter, 486 U.S. 456 (1988)	passim
Mills v. Habluetzel, 456 U.S. 91 (1982)	7, 9, 15, 18
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)	4
Pickett v. Brown, 462 U.S. 1 (1983)	passim
State v. Serr, 506 N.W.2d 421 (S.D. 1993)	passim
Sweringen v. St. Louis, 185 U.S. 38 (1902)	4
Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 175 (1972)	1
Yazoo and Mississippi Valley Railroad Co. v. Adams, 180 U.S. 1 (1901)	4

No. 93-1091

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF SOUTH DAKOTA, BY AND THROUGH THE DEPARTMENT OF SOCIAL SERVICES EX REL. GAIL A. DOTSON, IN HER OWN BEHALF AND ON BEHALF OF JARED DOTSON, A MINOR CHILD,

Petitioner,

v.

MERYL D. SERR,

Respondent.

INTRODUCTION

This Court held, twenty-two years ago, that

> imposing disabilities on the illegitimate child is contrary to the basic concept of our system that the legal burden should bear some relationship to individual responsibility or wrongdoing.

Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 175 (1972). Accordingly, eleven

years ago in Pickett v. Brown, 462 U.S. 1 (1983), this Court declared a two year statute of limitations on paternity suits to be unconstitutional. A year later, it invalidated a six year statute of limitations on paternity suits. Clark v. Jeter, 486 U.S. 456 (1988).

In 1993, however, the South Dakota Supreme Court upheld a two year statute of limitations on paternity suits. State v. Serr, 506 N.W.2d 421 (S.D. 1993). It is this fundamental inconsistency of state decisional law with federal decisional law which the state seeks to remedy here. Respondent makes a fleeting (and unpersuasive) effort to justify the decision of the State Supreme Court on the merits. His main attack on this Court's consideration of this case, however, was that the federal question was not properly raised or considered below. This argument fails, however, upon an examination of what actually occurred in this case, and upon a

more complete examination of the case law cited by Respondent himself, along with additional case law.

Finally, Mr. Serr, who does not here deny his paternity, see R.B. 6-8, contends that imposing this particular disability on his child, or other illegitimate children, does not present an important federal question. See R.B. 17-19.

I

THE QUESTION PRESENTED WAS CONSIDERED BELOW.

Respondent appears to assert that because the terms of the "Question Presented" to the South Dakota Supreme Court did not reference the unconstitutionality of the two year statute of limitations on paternity, the question simply was not adequately raised or decided. See R.B. 12-13.

That is not, of course, the law. In Sweringen v. St. Louis, 185 U.S. 38, 45-46 (1902), this Court said

> We do not hold it was necessary to plead the claim in order to show it was specially set up, but it must have been so referred to and mentioned as to show that it was present in the minds of the parties claiming the right, or must have been in some way presented to the court.

Similarly, in New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928), this Court said:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.

See also Cissna v. Tennessee, 246 U.S. 289, 293-294 (1918); Yazoo and Mississippi Valley Railroad Co. v. Adams, 180 U.S. 1, 15 (1901).

The record in this case shows that the South Dakota Supreme Court did, in fact, consider and answer the question. The issue

was appropriately raised in the State's Supreme Court brief in a long passage which the Respondent has assiduously ignored. The State argued:

> In the case of Clark v Jetter, [sic] 486 U.S. 456 (1988), our Supreme Court was asked to determine the constitutionality of Pennsylvania's six-year statute of limitations on paternity actions.

Appellee's Brief, Appendix A-110. A factual description follows. The State then commented:

> In examining Clark's Equal Protection argument, Jetter [sic] applied an intermediate scrutiny standard on the discriminatory classification of illegitimacy. Id. at 461. In applying this standard in the context of paternity actions, the Court recognized that in the case of Mills v. Habluetzel, 456 U.S., 91 (1982), it established the following framework.

Appellee's Brief, Appendix A-111.

The State then examined the argument which the Respondent insists is not part of this case. The State said:

> Serr argues that the 1978 version of SDCL 25-8-9 should apply because the state and its citizenry need to be protected from, 'the burden of litigating state [sic] claims.' (Serr brief p. 9.) Speaking on this issue, Jetter [sic] held Pennsylvania's six-year statute of limitations unconstitutional and stated, '[w]e are, however, confident that the six-year statute of limitations is not substantially related to Pennsylvania's interest in avoiding the litigation of stale or fraudulent claims.' Id. at 464.

Appellee's Brief, Appendix A-112.

The State's brief pointed out that there were other circumstances in which the state of Pennsylvania allowed paternity actions to be litigated after more than six years. Appellee's Brief, Appendix A-112. The State then compared Pennsylvania's statute to the South Dakota statute in a footnote:

> Similarly, South Dakota statutes in 1978 also allowed an action to be brought after six years, if paternity had 'been acknowledged by the father in writing or by the furnishing of support.' SDCL 25-8-9 (June 6, 1978).

Appellee's Brief, Appendix A-113 n.1.

Thus, the state of South Dakota in essence rejected Serr's argument that the 1978 version of SDCL 25-8-9 should apply on the grounds that it was unconstitutional. In association with rejecting this claim, the state cited and analyzed Clark v. Jeter, 486 U.S. 456 (1988), Mills v. Habluetzel, 456 U.S. 91 (1982), and also Pickett v. Brown, which the State described as striking down "Tennessee's two year statute." Appellee's Brief, Appendix A-114.

The issue was certainly adequately raised before the state Supreme Court. Did, then, the South Dakota Supreme Court decide the question? The court's decision first set out the statute in effect in 1978. State v. Serr, 506 N.W.2d 421, 422 (S.D. 1993); Appendix A-5. It stated further:

> Serr contended that under the facts of this case a cause of action for paternity became barred in June 1980.

Id. The state Supreme Court also drew specific attention to the holding of the trial court as follows:

> Also, the trial court held that '[t]he statute of limitations is not applicable to [Serr] as an affirmative defense.'

State v. Serr, 506 N.W.2d at 423; Appendix at A-7. (Brackets in original.)

The decision again drew specific attention to the statute of limitations as in effect in 1978. The Court said:

> Serr contends that the statute of limitations found in SDCL 25-8-9, as it existed in 1978, controls and barred any action for paternity and support after June 6, 1980.

Id. Further, the state Supreme Court stated:

> Dotson did not specifically raise any constitutional issues on her own behalf. However, her brief discussed several U.S. Supreme Court decisions concerning Equal Protection and paternity/statute of limitation issues, all of which have been distinguished by this writing and our reliance upon and discussion in Hove.

State v. Serr, 506 N.W.2d at 423 n.*; Appendix A-9 n.1 (emphasis added).

The state Supreme Court's comment that Dotson (i.e. the State) did "not specifically raise any constitutional issues on her own behalf," id., simply constitutes a recognition by the state Supreme Court that the State did raise constitutional issues in response to the argument made Mr. Serr. The remainder of the quotation simply confirms that state court considered and rejected the constitutional argument made on the basis of the cases cited by the State, i.e. Pickett, Mills and Clark, with regard to the two year statute of limitations. According to the state Supreme Court, "[a]ll" of this Court's decisions "concerning Equal Protection and paternity/ statute of limitations issues," id., cited by the State were distinguishable.

Mr. Serr, in addition, has failed to make any reference to the two dissents in this

case, both of which held the two year statute of limitations on paternity suits unconstitutional. Justice Wuest, in dissent, found that the "South Dakota statute of limitations failed the intermediate scrutiny test and violates the Equal Protection Clause of the Fourteenth Amendment." State v. Serr, 506 N.W.2d at 423; Appendix A-11 (Wuest, J. dissenting).

Justice Sabers, also in dissent, found that:

> As clearly outlined in Pickett . . . (two year statute of limitations unconstitutional) SDCL 25-8-9 was unconstitutional at all times prior to 1986 because it violated the Equal Protection Clause of the Fourteenth Amendment.

State v. Serr, 506 N.W.2d at 425; Appendix A-18 (Sabers, J., dissenting).

It is also worth noting that at least one of the state's lower courts has come to the conclusion that the State v. Serr decision has foreclosed further examination of whether the

1978 statute of limitations is unconstitutional. In a case which has just come to the attention of this office, Weegar and Aurnger v. Bakeberg, (Civ. 92-2769) (Second Judicial Circuit) a maternal grandmother of Cassie Lane Kenyon sought a determination of the paternity of this 14-year-old. The putative father moved to dismiss on the grounds that the 1978 statute of limitations had run. The attorneys for the child argued that the two year statute of limitations was unconstitutional stating:

> In 1979, when Cassie Lane Kenyon was born, SDCL 25-8-5 allowed only two (2) years for the parent of an illegitimate child to seek establishment of the child's paternity and child support. In 1983, the U.S. Supreme Court declared that a two (2) year statute of limitations in paternity cases violated the Equal Protection Clause of the United States Constitution. Pickett v. Brown, 462 U.S. 1. . . . This declaration made two year statutes of limitations void and not enforceable.

Weegar and Aurnger v. Bakeberg, (Brief Regarding Constitutionality of SDCL 25-8-5) at 1.

Lawyers for the child also cited Clark v. Jeter, 486 U.S. 456 (1988), for the proposition that SDCL 25-8-9 was unconstitutional. Id. at 2.

The circuit court, however, granted the dismissal. According to a brief letter opinion:

> Dear Counsel: The defendant has filed a motion to dismiss the proceedings because of the statute of limitations provided in SDCL 25-8-9. Upon review of the recent South Dakota Supreme Court decisions of State of South Dakota, ex rel Dotson v. Serr (opinion filed October 6, 1993) and State of Minnesota, ex rel Hove v. Doese (opinion filed June 9, 1993), this Court finds the defendant's motion meritorious. Both decisions have held that once an action has been barred by the statute of limitations, it cannot be revived by subsequent legislation. The Supreme Court in those decisions has not found the statute unconstitutional.
>
> Mr. Farrell should draft an Order dismissing the plaintiff's claim.

Letter of Circuit Judge Meierhenry, December 1, 1993.

Thus, State v. Serr was cited for the proposition that the two year statute of limitations was essentially unreviewable with regard to constitutional attacks.[1]

In sum, the State in its brief in the state Supreme Court argued the constitutionality of the 1978 statute of limitations. The state Supreme Court, on review, noted the reliance of Mr. Serr on that very statute. Critically, it drew attention to the brief of the state concerning this Court's decisions "concerning Equal Protection and paternity/ statute of limitations issues" and indicated that "all . . . have been distinguished by this writing and our reliance upon discussion in Hove." State v. Serr, 506 N.W.2d at 423 n.*; Appendix A-9 n.1. Taking the Supreme Court's decision at face value, it considered

---

[1]The state has been informed that this case is being appealed to the South Dakota Supreme Court.

and rejected the arguments made by the state with regard to the two year statute of limitations. Further, two of the Justices of the Supreme Court in dissent did find the two year statute of limitations as it existed in 1978 to be unconstitutional. Finally, it now appears clear that the state's circuit courts regard the Serr case as binding on the issue of whether the two year statute is constitutional.

The argument that the South Dakota Supreme Court did not consider the issue now presented to this Court is accordingly without merit.[2]

---

[2]Webb v. Webb, 451 U.S. 493 (1981), which is relied on so heavily by Respondent, is easily distinguishable. In Webb, the state Supreme Court had not even "mentioned" the federal question nor had it been "mentioned by the dissenting opinion." Webb, 451 U.S. at 495. Further, the Petitioner had not, in the state Supreme Court, cited to the federal constitution or cases interpreting the Full Faith and Credit Clause said to be at issue in Webb. Here, of course, the state set out the argument and federal case authority, including

II

A TWO YEAR STATUTE OF LIMITATIONS ON PATERNITY ACTIONS MAY NOT CONSTITUTIONALLY BE APPLIED TO SHIELD THE PUTATIVE FATHER FROM SUIT CONSISTENT WITH THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION.

Mr. Serr makes little serious effort to evade the direct holdings of Mills v. Habluetzel, 456 U.S. 91 (1982); Pickett v. Brown, 462 U.S. 1 (1983); and Clark v. Jeter, 486 U.S. 456 (1988), which invalidated one, two and six year statutes of limitations on paternity actions. He mainly repeats his claim that the issue had not been considered by the state Supreme Court and argues that the state Supreme Court had considered only the issue of retroactive application of the

---

Mills, Pickett, and Clark, but the argument and cases were deemed distinguishable by three members of the court. The two dissenting members of the court, in contrast to those in Webb, specifically reached the question and would have decided it adversely to the Respondent.

statute of limitations. Respondent's Brief, p. 19 et seq.

Respondent thus simply compounds his other errors. An issue may indeed arise as to whether a new statute of limitations may revive an expired cause of action. This issue should not arise, however, if the statute of limitation which has allegedly run was unconstitutional in the first place. As Justice Sabers stated in his dissent in State v. Serr, 506 N.W.2d at 425; Appendix A-19 (Sabers, J., dissenting):

> Therefore, as in Pickett and Clark, because the statute at issue was unconstitutional, it is not, nor was it ever, available to the defendant as an affirmative defense.

Justice Sabers also stated on the footnote to the text above:

> Absent the statute, the child is on equal footing with legitimate children, and Dotson would have until the child reached the age of eighteen to establish paternity and seek child support.

State v. Serr, 506 N.W.2d at 425 n.2; Appendix A-19 n.3.

Thus the retroactivity issue which Mr. Serr brought to the attention of the South Dakota Supreme Court is actually of little relevance if, as the state argues, the two year statute of limitations which is relied upon is itself unconstitutional.

Mr. Serr also quibbles over the number of children who could be harmed by the upholding of the two year statute of limitations. He does not, it should be noted, suggest any reason to doubt the validity of statistics from annual reports authored by the "South Dakota Department of Health, Vital Records Program." Nor can he offer any support for his outlandish suggestion that "it is possible that all of the approximately 8,600 children so generally referred to have established paternity." Respondent's Brief 18. Evidence before this Court does establish that at least

two children have been unable to establish paternity: Jared Dotson, whose case is at issue here and Cassie Lane Kenyon who has been refused an opportunity to prove the paternity of her alleged father on the basis of Serr.

CONCLUSIONS

The State of South Dakota thus respectfully requests that this Court grant the Petition for Writ of Certiorari, vacate the decision below, and remand to the South Dakota Supreme Court for reconsideration in light of Mills, Pickett and Clark.

Respectfully submitted,

MARK W. BARNETT
ATTORNEY GENERAL
Counsel of Record

John P. Guhin
Deputy Attorney General
Patricia J. Froning
Assistant Attorney General
500 E. Capitol
Pierre, SD 57501-5090
Telephone: (605) 773-3215